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In The Supreme Court of The United States

OCTOBER TERM, 1941

No.....

BEN MAY,

Petitioner,

Versus

THE MIDWEST REFINING COMPANY,
STANDARD OIL COMPANY, and
STANOLIND OIL AND GAS COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Ben May respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of Ben May, Plaintiff, Appellant, versus The Midwest Refining Company, Standard Oil Company (of Indiana), and Stanolind Oil and Gas Company, Number 3637 on the docket of said Court, entered on June 6, 1941 (R. 432) affirming the decree of the District Court of the United States for the District of Maine in said cause (R. 400).

SUMMARY STATEMENT OF MATTER INVOLVED

This is a derivative and representative suit filed on January 13, 1933, (R. 2-35) by Ben May as a minority stockholder of The Midwest Refining Company, a corporation, against Standard Oil Company (of Indiana), Stanolind Oil and Gas Company, its controlled subsidiary, and The Midwest Refining Company. The complaint as amended on April 7, 1937, (R. 256-288) seeks in prayers (b) and (c) to set aside a sale of all assets of The Midwest Refining Company to Standard Oil Company and Stanolind Oil and Gas Company, and an accounting for all revenues received from said properties of The Midwest Refining Company since the date of said sale, upon the allegations that Standard Oil Company, the dominant majority stockholder of The Midwest Refining Company, by virtue of its dominance and in breach of its duties and obligations as trustee for the minority, had forced said sale to itself and its controlled subsidiary, Stanolind Oil and Gas Company, at a price which was inadequate to the extent of at least millions of dollars (R. 266), without making any effort to sell said assets to any other purchaser (R. 274). In prayers (d) and (e), the amended bill seeks recovery in the right of The Midwest Refining Company of approximately ten million dollars alleged to be due from Standard Oil Company, and, in the alternative that said sale is not set aside, it seeks to recover for The Midwest Refining Company over five million dollars of the purchase price agreed to be paid by Standard Oil Company for the assets of The Midwest Refining Company (prayer f), and to estab-

lish a liability of Standard Oil Company to The Midwest Refining Company arising out of an alleged fraudulent transfer of stock immediately before said sale (prayer g).

On January 13, 1938, defendants filed a "special motion" (R. 290) with two objectives, first, to strike out and dismiss prayers (b) and (c); second, in the event said prayers are stricken, to obtain a dismissal of the suit upon payment to plaintiff or into Court of plaintiff's share of any amounts that could be recovered on behalf of The Midwest Refining Company under the remaining prayers together with costs and counsel fees. The motion alleges as the basis for striking said prayers (b) and (c) that plaintiff had not filed a written dissent from said sale, from which is drawn the legal conclusion "that by virtue of the provisions of* Section 64 of Chapter 56 of the Revised Statutes of the State of Maine * * the complainant is not entitled to the relief prayed for in said prayers numbered (b) and (c); that the defendants herein should not be put to the great expense involved in the taking of testimony, preparation and trial of the issues raised by said prayers (b) and (c)" and are, for said reasons, "entitled as a matter of law and equity to have said prayers (b) and (c) stricken from the complainant's said amended Bill of Complaint." (R. 292-3). In the event, and upon the condition, that said prayers (b) and (c) be stricken from the plaintiff's complaint, the defendants offered "to submit to the demands of the complainant as set forth in the remaining prayers of his bill" and "to pay to the complainant his full share of any amounts that could be recovered under the remaining prayers (d), (e), (f) and (g)" together with

costs and counsel fees to be fixed by the Court (R. 293), and moved the Court to "determine the amount of the plaintiff's share in any recovery of the full amounts set forth in the remaining prayers (d), (e) (f) and (g) of said bill and determine the amount of costs and counsel fees to which the complainant and his counsel are entitled, and that upon payment by these defendants to the complainant or into this Court of the amount so determined, the complainant's bill be dismissed." (R. 293).

As a predicate for the latter relief, defendants alleged in said motion that all stockholders not represented or voting at the meeting at which said sale was voted, as well as all stockholders who had voted for said sale, had accepted their liquidating dividends without protest, and that Standard Oil Company, pending this suit, had acquired all of the stock that had voted against said sale except the stock of plaintiff, and that of Norwin S. Bean, who had elected to recover the value of his stock under the Maine valuation statute. From these allegations defendants drew the legal conclusion that there was no other stockholder similarly situated to plaintiff, or who had any right to intervene or join in the suit, and, upon this assumption, they alleged, as the basis of their motion to dismiss the bill upon payment of plaintiff's share of the recovery to which The Midwest Refining Company was otherwise entitled, that plaintiff's share in any recovery under said prayers (d), (e), (f) and (g) will be a small fraction of the expense to which defendants will be put in taking testimony and preparing the cause for trial on the merits. (R. 293).

The motion was submitted by defendants on ex parte affidavits (R. 294-300) to the effect that the records of The Midwest Refining Company showed that plaintiff, while voting against the sale in question, had never filed a written protest against the same; that pending the suit, Standard Oil Company had acquired all of the stock voting against the sale except that of plaintiff, and that of Norwin S. Bean, who instituted proceedings for valuation of his stock under the Maine statute, and that all other stockholders, except the holder of one share, had accepted their liquidating dividends without protest.

There was no evidence by affidavit or otherwise in regard to the alleged necessity for defendants to take voluminous testimony at burdensome expense, the affidavits offered to support the motion being entirely silent on that subject. There was accordingly no evidence to support the alleged burdensome expense that would result to defendants from allowing plaintiff's suit to proceed according to established practice to a recovery in the primary right of The Midwest Refining Company.

The motion having been submitted by respondents on said ex parte affidavits (R. 294-300) the Court rendered an opinion that the motion should be granted (R. 300-308), but instead of then entering a decree granting the motion, withheld such decree, and later entered an order appointing a master to take testimony (R. 309):

"1. In relation to the amount which would represent the plaintiff's proportion, based on his

proportionate stock holding in Midwest Refining Company, of the amounts claimed by the plaintiff in prayers d, e, f and g of the bill, assuming the allegations of the bill on which said prayers d, e, f, and g are predicated to be true.

2. In relation to the amount allowable to the plaintiff for counsel fees and expenses arising out of this litigation; * *."

At the reference before the Special Master it was stipulated by the parties through their attorneys of record, that assuming the truth of the allegations of the amended bill in regard to prayers (d), (e), (f) and (g), the total recovery under said prayers would be under prayer (d) $10,243,225.53; prayer (e) $119,-224.62; prayer (f) $5,091,164.96; and prayer (g) 101,-066.47, or a total under the four prayers of $15,554,-681.58, and that plaintiff's proportion thereof based on his proportionate stock ownership in The Midwest Refining Company is $1,246.22 as of November 1, 1932 (R. 389-90).

Based on this stipulation and testimony in regard to counsel fees and expenses, the District Court entered its final decree (R. 400) granting the special motion by striking prayers (b) and (c), by ordering the payment into Court of $1,246.22, representing plaintiff's share of the recovery under prayers (d), (e), (f) and (g) with interest to the date of the decree; the payment into Court of $40,800.00 for plaintiff's counsel fees; $2,346.27 for plaintiff's expenses; plaintiff's cost of court as taxed by the clerk; and by ordering that upon the payment of said sums with interest to date that "the plaintiff's bill be dismissed."